

# CHAPTER 1.

## Introduction

The federal government requires state and local governments to implement the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Georgia Department of Transportation (GDOT) has been implementing some version of the Federal DBE Program since the 1980s. The USDOT recommends that agencies such as GDOT conduct disparity studies to develop the information needed to effectively implement the Program.

- GDOT must set overall goals for DBE participation in its USDOT-funded contracts. Some of the information most useful in setting overall DBE goals and fine-tuning program implementation requires the types of research developed in a disparity study.
- When challenged in court, state and local agencies that have successfully defended their implementation of the Federal DBE Program relied on the types of information developed in a disparity study.
- The study can provide insights into improving opportunities for all small businesses.
- An independent, objective review of an agency's contracting is valuable to its leadership and outside groups interested in the agency's practices.

In 2011, GDOT retained BBC Research & Consulting to conduct a disparity study that would help it implement the Federal DBE Program. The analysis is referred to as a “disparity study” because it examines whether there is a disparity between an agency's *utilization* of minority- and women-owned firms and what would be expected based on *availability* of minority- and women-owned firms to perform this work. The study incorporates other quantitative and qualitative information as well. GDOT last conducted a disparity study in 2005.

Results of this study will help GDOT implement the Federal DBE Program for its contracts funded in whole or in part by the Federal Highway Administration (FHWA). The Federal DBE Program also applies to contracts funded by the Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). Because GDOT receives relatively little funding from the FTA and FAA, the study did not focus on those contracts. Information from the disparity study is also useful to GDOT as it seeks to ensure a non-discriminatory environment for its state-funded contracting.

In Chapter 1, the study team:

- A. Introduces firms that prepared the study;
- B. Provides background on the Federal DBE Program; and
- C. Outlines the analyses performed in the study and where results appear in the report.

## A. Study Team

The BBC study team included five firms:

- **BBC Research & Consulting (BBC)**, a Denver-based economic and policy research firm (prime consultant). BBC has overall responsibility for this study and performed most of the required quantitative analyses.
- **Keen Independent Research LLC**, a Denver-based economic and market research firm that specializes in disparity studies. Keen Independent Research co-directed the study.
- **Holland & Knight LLP (H&K)**, a national law firm with offices throughout the country, including Atlanta. H&K provides a legal analysis for this study.
- **Red Bridge Consulting, Inc.**, an information technology and business process analysis firm. Red Bridge supported BBC in the collection of electronic and hard copy contract and proposal data as well as the review of GDOT's contracting procedures. Red Bridge is certified as a DBE with GDOT.
- **TCG Consulting, Inc. (TCG)**, a marketing communications and market research firm specializing in market research studies, community outreach, customer communications and public education campaigns. TCG compiled and analyzed past complaints filed with GDOT concerning DBE issues and chaired public forums to obtain community feedback about the draft report. TCG is a veteran-, minority- and woman-owned business and is certified with GDOT as a DBE.
- **Customer Research International (CRI)**, a national telephone survey firm based in San Marcos, Texas. CRI performed telephone interviews with owners and managers of Georgia businesses as part of the availability analysis. CRI performed similar services on other BBC disparity studies. CRI is a minority-owned firm.

Each of these team members has extensive experience with state departments of transportation and other agencies implementing the Federal DBE Program. Several team members have helped to successfully defend DBE and minority business enterprise programs in court.

## B. Background on the Federal DBE Program

GDOT has been implementing some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be implemented by state and local agencies receiving USDOT funds. It was most recently revised in early 2011.

Federal regulations in 49 CFR Part 26 guide how state and local governments implement the Federal DBE Program. If necessary, under the federal regulations, the Program allows state and local agencies to use DBE contract goals, which GDOT sets on certain FHWA-funded contracts. When awarding those contracts, in accordance with federal regulations, GDOT considers whether or not a bidder meets the DBE contract goal or shows good faith efforts to do so.

The Federal DBE Program also applies to cities, counties, transportation authorities and other jurisdictions that receive USDOT funds through agencies such as GDOT.

**Key elements of the Program.** Key components of the Federal DBE Program include the following:

**Setting an overall goal for DBE participation.** GDOT must develop an overall three-year goal for DBE participation in its FHWA-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a “base figure” and consideration of possible “step 2” adjustments to the goal.<sup>1</sup>

GDOT’s overall goal for DBE participation is aspirational — the Department does not need to meet the goal and failure to do so does not automatically cause any USDOT penalties. Its goal for the three-year period beginning 2010 is 12 percent DBE participation.

**Establishing the portion of the overall DBE goal to be met through neutral means.** Regulations governing implementation of the Federal DBE Program allow for state and local governments to implement the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.” Race-neutral program measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses (see 49 CFR Section 26.51(b) for more examples of race-neutral program measures). If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements.

The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, that it will meet through any race-conscious measures such as DBE contract goals. USDOT has outlined a number of factors for an agency to consider when making that determination.<sup>2</sup>

Many states project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures. Some state and local agencies have implemented the Federal DBE Program solely through neutral measures and without the use of DBE contract goals (state DOTs in Florida, Wyoming and Rhode Island are examples). These agencies projected that 100 percent of their DBE goal would be met through neutral means.

GDOT’s most recent projection related to FHWA-funded contracts is that it will meet 2 percentage points of its overall three-year DBE goal through race-neutral means and 10 percentage points through race-conscious measures.<sup>3</sup>

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<sup>1</sup> 49 CFR Section 26.45.

<sup>2</sup> See Chapter 11 of this report for an in-depth discussion of these factors.

<sup>3</sup> Georgia Department of Transportation Disadvantaged Business Enterprise Program Goal Setting Process for FY 2009-2010.

**Determining whether all racial/ethnic/gender groups will be eligible for race or gender-conscious elements of the Federal DBE Program.** Under the Federal DBE Program, the following race/ethnic/gender groups can be presumed to be disadvantaged as long as they do not exceed firm revenue and personal net worth limits:

- Black Americans (or “African Americans” in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

There is a gross receipts limit (not more than \$22,410,000 annual average revenue over three years, and lower limits for certain lines of business) and a personal net worth limit (\$1.32 million, not including equity in the business and in primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE.<sup>4</sup> White male-owned firms can also meet the federal certification requirements and be certified as DBEs. (Nationally, few DBEs are white male-owned firms.)

GDOT’s current implementation of the Program, similar to most states, includes each of the above groups as eligible for race- and gender-conscious portions of the program, including meeting DBE contract goals. However, USDOT provides a waiver provision if an agency determines that it does not need to include certain racial/ethnic/gender groups in the race- or gender-conscious portions of the Federal DBE Program. Some state DOTs have set contract goals for “Underutilized DBEs” (UDBEs), which does not include all DBE groups. These states count the participation of all DBEs toward their overall DBE goals, but only UDBEs can be used to meet individual contract goals. Each state determined the DBE groups that were UDBEs in part by examining results of disparity analyses for each racial/ethnic/gender group.

**Promoting DBE participation as prime contractors.** The Federal DBE Program calls for agencies to remove any barriers to DBE participation as prime contractors, but does not require agencies to implement programs that give preference to DBE primes. Quotas are prohibited, but under extreme circumstances, an agency can request USDOT approval to use preference programs related to prime contractors.

Agencies such as GDOT are required to develop programs to assist all small businesses. For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

**Promoting MBE/WBE participation as subcontractors.** In accordance with federal regulations and subject to USDOT approval, an agency can decide that it will use DBE contract goals as part of its implementation of the Federal DBE Program. GDOT currently uses DBE contract goals for certain FHWA-funded contracts.

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<sup>4</sup> 49 CFR 26 Subpart D.

**Past court challenges to the Federal DBE Program and to state and local agency implementation of the Program.** Although agencies are required to implement the Federal DBE Program in order to receive USDOT funds, different groups have challenged that implementation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix A of this report.
- State transportation departments in California, Illinois, Minnesota and Nebraska successfully defended their implementation of the Federal DBE Program, as have several local agencies. The Washington State Department of Transportation was not able to successfully defend its implementation of the Federal DBE Program. Chapter 2 and Appendix A also review these legal cases.

The U.S. District Court for the Eastern District of California reviewed the methodology and the information included in BBC's disparity study for the California Department of Transportation in the case of *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*. As discussed in more detail in Appendix A, the district court favorably reviewed the methodology and the quantitative and qualitative information BBC provided in the disparity study.

BBC applied a methodology in the GDOT disparity study that is very similar to what the court reviewed in the California Department of Transportation study.

### **C. Analyses Performed in the Disparity Study**

The disparity study provides information to assist GDOT as the agency:

1. Establishes a new three-year goal for DBE participation in its FHWA-funded contracts;
2. Estimates the portion of its overall DBE goal to be met through race- and gender-neutral means and any portion to be met through race- and gender-conscious means;
3. Chooses the specific measures it will apply when implementing the Program; and
4. Considers the specific racial/ethnic/gender groups of DBEs eligible for DBE contract goals if it determines that it will continue to implement race-conscious measures.

The information is also useful to GDOT as it seeks to ensure fairness across all of its contracting, including non-FHWA-funded contracts.

**Utilization, availability and disparity analyses.** Disparity studies typically include analyses of whether there is a disparity between the *utilization* and *availability* of minority- and women-owned firms (MBE/WBEs).

- “Utilization” typically refers to the percentage of contract dollars (including subcontracts) that went to MBEs and WBEs during the study period. (Percentage of *dollars* has been accepted in courts as an appropriate way of measuring utilization.)
- “Availability” refers to the percentage of contract dollars that one might expect to go to MBEs and WBEs given the number of MBEs and WBEs (relative to all firms) available for specific types and sizes of prime contracts and subcontracts. Understanding firms “ready, willing and able” to perform an agency’s contract or subcontract is an important component of the availability analysis.

BBC includes both certified and non-certified minority- and women-owned firms in the utilization and availability results so that the disparity analysis would pertain to any potential barriers related to race, ethnicity or gender of the business owner.<sup>5</sup> The study further disaggregates utilization and availability of minority-owned firms according to the minority groups defined within the Federal DBE Program.<sup>6</sup>

**Utilization analysis.** BBC analyzed the utilization of minority- and women-owned firms on transportation construction and engineering-related contracts that GDOT awarded from January 2009 through June 2011. The study team analyzed utilization as prime contractors and as subcontractors.

BBC separated GDOT contracts into those that were FHWA-funded (in whole or in part) and those that were solely funded through state monies. GDOT set DBE contract goals on many of its FHWA-funded contracts.

The study team identified the race/ethnicity/gender ownership of firms receiving GDOT contracts and subcontracts through sources including DBE and other certification databases and interviews with owners and managers of those businesses. BBC reports utilization in two ways:

- The percentage of GDOT contract dollars going to certified DBEs (for informational purposes); and
- The percentage of contract dollars going to all minority- and women-owned firms whether or not they were DBE-certified (for use in the disparity analysis).

BBC was also able to collect and analyze information on some of the contracts that local agencies award with the FHWA and state funds they receive through GDOT.

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<sup>5</sup> If the disparity analysis were conducted based only on currently certified DBEs, conclusions could not be drawn about the effectiveness or need for programs to assist minority- and women-owned firms.

<sup>6</sup> To further isolate the possible effects of race/ethnicity versus gender, “WBEs” refers to white women-owned firms in the disparity study. Firms owned by minority women are included in the utilization and availability results for minority-owned firms.

Chapter 3 of the report summarizes study team efforts to collect GDOT contract data, with Appendix B providing additional detail. Chapter 6 presents results of the utilization analysis.

**Availability analysis.** The availability analysis provides a benchmark to use when assessing GDOT's utilization of minority- and women-owned firms. It also produces information for GDOT to consider when setting its three-year goal for DBE participation on FHWA-funded contracts.

BBC analyzed availability of MBEs and WBEs on a contract-by-contract basis for GDOT prime contracts and subcontracts from 2009 through June 2011. Overall availability figures were then developed by adding (on a dollar-weighted basis) the results of the availability analysis for individual prime contracts and subcontracts.

BBC prepared information such as type of work, size, location and date for each individual prime contract and subcontract from GDOT contract records. More than 4,800 prime contracts and subcontracts were examined.

The study team collected information on the availability of minority- and women-owned businesses and other firms to perform specific types and sizes of prime contracts and subcontracts in different locations by interviewing Georgia companies about their qualifications and interest in GDOT work.<sup>7</sup> The study team successfully contacted more than 4,500 business establishments by telephone or other means as part of this research.

BBC determined the percentage of firms available to perform each prime contract and subcontract that were minority- or women-owned; BBC then dollar-weighted the results for individual prime contracts and subcontracts across all GDOT contracts. The resulting availability estimates are expressed as the percentage of GDOT contract dollars that might be expected to go to minority- and women-owned firms if they had the same opportunities as other firms (given their respective qualifications and interest in GDOT work).

Chapter 5 describes the methods used to collect and analyze availability of minority-, women- and majority-owned firms, and also presents information on GDOT's "base figure" for its overall DBE goal. Appendix C provides further information about the availability interviews with Georgia businesses.

**Disparity analysis.** BBC compared utilization and availability of minority- and women-owned firms to prepare the disparity analyses. The study team examined:

- GDOT FHWA-funded contracts (for which GDOT often set DBE contract goals); and
- GDOT state-funded contracts (for which GDOT did not set DBE goals).

Chapter 7 of the report outlines the approach to the disparity analysis and reviews key results. Chapter 8 and Appendix K provide additional analyses.

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<sup>7</sup> Because nearly all of GDOT contract dollars go to firms with Georgia locations, the relevant geographic market area for this analysis was Georgia. Telephone interviews with businesses potentially available for GDOT contracts were made with firms that had locations in Georgia.

**Analysis of local marketplace conditions.** The study team also examined conditions within the Georgia marketplace. In accordance with USDOT guidance, BBC analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in construction and engineering in Georgia (Appendix D);
- Any differences in rates of business ownership in Georgia (discussed in Appendix E);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (Appendix G);
- Any barriers concerning access to business credit, insurance and bonding (Appendix H); and
- Other issues potentially affecting minorities and women in the local marketplace.

Chapter 4 of the report synthesizes this information about the local marketplace, including comments from telephone interviews with business owners and managers and a review of complaints made with GDOT concerning DBE issues. BBC also included a review of information from recent disparity studies conducted for local agencies in Georgia as part of the marketplace analysis (Appendix J).

Before the study team finalized the disparity study report, GDOT posted the draft report on its website and solicited public comments. GDOT held public meetings in Atlanta, Thomaston and Savannah where interested parties could provide oral comments about the local marketplace, any analyses in the draft report, GDOT's implementation of the Federal DBE Program and other relevant topics. Written comments were requested as well. A number of individuals and groups provided oral and written comments at the public meetings and others sent written comments to GDOT. The disparity study team reviewed comments before preparing a final report. Information received is summarized in Appendix L as well as in individual chapters of the report.

Chapter 9 of the report summarizes the disparity analyses and research about the local marketplace.

**Information regarding GDOT's future implementation of the Federal DBE Program.**

GDOT can consider disparity study information presented in Chapter 10 as it develops its new three-year goal for DBE participation. The information in Chapter 11 is pertinent as GDOT projects the portion of its goal to be met through neutral means. Chapter 12 of the report reviews other components of GDOT's implementation of the Federal DBE Program.



**Presentation of results in the study.** Each chapter in the report provides the documentation and results necessary to help GDOT make future decisions concerning its implementation of the Federal DBE Program. To summarize:

- **Chapter 2** outlines the legal framework for the disparity study.
- **Chapter 3** discusses how the study team collected GDOT contract data and then defined the geographic area and transportation contracting subindustries that are the focus of the study.
- **Chapter 4** reviews information on local marketplace conditions.
- **Chapter 5** presents information related to the relative availability of minority- and women-owned firms for GDOT contracts and subcontracts.
- **Chapter 6** examines the utilization of DBEs and minority- and women-owned firms on GDOT contracts.
- **Chapter 7** compares utilization of minority- and women-owned firms with what might be expected given the availability of firms to perform that work (disparity analysis).
- **Chapter 8** explores possible reasons for any disparities in the utilization of minority- and women-owned firms in GDOT contracts.
- **Chapter 9** summarizes the evidence from the marketplace analyses and disparity analyses.
- **Chapter 10** provides information for GDOT to use in setting a three-year overall DBE goal, including consideration of a “step 2 adjustment.”
- **Chapter 11** presents information helpful to GDOT when it determines the percentage of its overall DBE goal to be met through neutral means.
- **Chapter 12** reviews other information related to GDOT implementation of the Federal DBE Program. This chapter addresses future local agency implementation of a GDOT-administered Program.

In addition to the chapters described above, 12 report appendices provide supporting information concerning study methodology and results.